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No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR PETITIONER

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February 25, 1988

QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court's refusal to recognize the judgment of the New York Court of Appeals vacating petitioner's 1963 conviction violates the Full Faith and Credit Clause of the Constitution?

2. In a death case where the principal aggravating circumstance relied on at sentencing was a 20-year-old out-of-state conviction, does the subsequent invalidation of that conviction—when there was no other evidence to support that aggravating circumstance—require petitioner to be resentenced?

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR PETITIONER

This brief is respectfully submitted by petitioner Samuel Bice Johnson, who was sentenced to death for capital murder in Mississippi in 1982. It seeks reversal of his death sentence.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi denying petitioner's motion for post-conviction relief is reported as *Johnson* v. *State*, 511 So. 2d 1333 (Miss. 1987); it is reprinted at JA. 98-114.[1] The opinion of that court affirming Johnson's 1982 conviction and sentence on direct appeal is reported as *Johnson* v. *State*, 477 So. 2d 196 (Miss. 1985), and is reprinted at JA. 35-88.

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1 "JA. ____" references are to pages in the Joint Appendix.

The decision of the New York Court of Appeals reversing Johnson's 1963 conviction for assault in the second degree and dismissing the underlying indictment is reported as *People* v. *Johnson*, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) (*per curiam*). The opinion of the New York Supreme Court, Appellate Division, Fourth Department denying Johnson's motion to vacate his 1963 conviction is reported as *People* v. *Johnson*, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986); that court's order denying rehearing is unreported. The opinion of the County Court for Monroe County resentencing Johnson but otherwise denying post-conviction relief is unreported.[2]

JURISDICTION

The judgment of the Supreme Court of Mississippi denying Johnson's motion for post-conviction relief was entered on May 27, 1987. A motion for rehearing was timely filed on June 11, 1987 and was denied on July 15, 1987. The petition for certiorari was filed on September 14, 1987 and was granted on January 11, 1988, limited to Questions 1 and 2.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article IV, § 1 and the Eighth and Fourteenth Amendments to the Constitution of the United States; 28 U.S.C. § 1738 (1982); and Miss. Code Ann. §§ 97-3-19 and 99-19-101 (Supp. 1987). These provisions are set forth in the Statutory Appendix to this brief.

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2 Copies of the New York decisions below have been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Samuel Johnson was tried and convicted of capital murder in Pike County, Mississippi, and was sentenced to death on September 3, 1982. His conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court on May 8, 1985. *Johnson* v. *State*, 477 So. 2d 196 (Miss. 1985) (JA. 35-88). A timely petition for certiorari was denied on May 5, 1986. *Johnson* v. *Mississippi*, 476 U.S. 1109 (1986) (Brennan and Marshall, JJ., dissenting). A petition for rehearing was also denied. *Johnson* v. *Mississippi*, 476 U.S. 1189 (1986).

On August 4, 1986 Johnson filed a motion for post-conviction relief in the Mississippi Supreme Court. On March 24, 1987, while this motion was pending, the New York Court of Appeals reversed Johnson's 1963 New York conviction for second degree assault, which had been relied on at sentencing in the 1982 Mississippi trial (JA. 19-24; 26-30).

On May 27, 1987 the Mississippi Supreme Court denied Johnson's motion for post-conviction relief. *Johnson* v. *State*, 511 So. 2d 1333 (Miss. 1987) (JA. 98-114). Justices Robertson, Prather and Sullivan dissented (JA. 114-21).

On July 13, 1987 the Mississippi Supreme Court granted a stay of execution to permit Johnson to seek review of its May 27, 1987 decision in this Court (JA. 2). On July 15, 1987 the Mississippi Supreme Court denied Johnson's petition for rehearing without opinion (JA. 2).

A petition for a writ of certiorari was filed on September 14, 1987, and the petition was granted on January 11, 1988, limited to Questions 1 and 2.

STATEMENT OF FACTS

Samuel Bice Johnson is a 45-year-old black man from Rochester, New York. In 1963, when he was 20 years old, he was convicted of second degree assault in the County Court for Monroe County, New York, as a result of an incident involving

his refusal to pay a prostitute for her services (JA. 136-37). A confession was introduced at his trial without a hearing to determine its voluntariness, despite his protestation that it was the product of coercion (JA. 128; 131; 137-39). Johnson was sentenced to a prison term of 1½ to 3 years, served one year and was paroled for good behavior. He was not advised of his right to appeal from that conviction, and his repeated *pro se* efforts to obtain review of it were unsuccessful.

1. The Mississippi Capital Murder Case

In 1982 Johnson was tried in Pike County, Mississippi, and convicted of capital murder in connection with the killing of a white State Highway Patrolman, Billy Langham. Langham had been stabbed and then shot to death after stopping a car in which Johnson, Charles Montgomery, Jr., Anthony Fields and Otis Lee Fairley were driving on U.S. Highway 49 near Collins, Mississippi (JA. 35).[3] Fields agreed to testify against the other three men, and was allowed to plead guilty to being an accessory after the fact of capital murder (JA. 39).[4] Johnson, Montgomery, and Fairley were each charged and separately tried for capital murder. Montgomery and Fairley each received life sentences (JA. 35).[5] Only Johnson was sentenced to death.

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3 There is no dispute that the person who shot Officer Langham was Montgomery. This fact was conceded by the prosecutor at trial (R. 2277) and acknowledged by the Mississippi Supreme Court on direct appeal. 477 So. 2d at 206-07 (JA. 38). The State's theory was that Johnson first stabbed the officer and then told Montgomery to shoot him. The defense theory was that Fields, not Johnson, stabbed the officer. Three eyewitnesses called by the State gave a description of the person who did the stabbing that fit Fields, but not Johnson (R. 1298-99; 1326-27; 1332). "R. _____" references are to the record on direct appeal of Johnson's 1982 trial.

4 Fields pleaded guilty to being an accessory after the fact of capital murder and was sentenced to 5 years in prison. As part of the plea bargain, he was sentenced to 25 years for other crimes.

5 Montgomery was convicted of capital murder, but received a life sentence. Fairley was convicted of murder and sentenced to life imprisonment. The trial court did not allow Johnson's jury to be told what sentences they received (R. 2135).

After a three-day trial Johnson was found guilty of capital murder (R. 2129). At the sentencing hearing before the same jury, the only new evidence that the prosecutor introduced was a purported authenticated copy of Johnson's 1963 conviction for second degree assault in Monroe County, New York.[6] That document described Johnson's 1963 conviction as for "second degree assault with intent to commit first degree rape." The prosecutor did not offer any new evidence at sentencing to support the other two aggravating circumstances that the jury ultimately found (R. 2164-66) and barely mentioned either in his closing argument (JA. 19-24; 26-30).

The prosecutor's closing argument at the sentencing phase referred to Johnson's 1963 New York conviction some 22 times (JA. 19-24; 26-30), telling the jury, *inter alia*:

- "[A] lot of good-hearted and well-meaning people who don't understand the purpose and the necessity of capital punishment will probably say that I'm very cold and harsh and cruel when I stand here and I say that *because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die.*" (JA. 23) (emphasis added)

- "*What concerns me is what is going to happen the next time he decides to commit a second degree assault with intent to rape* and what is going to happen the next time he decides he wants a Highway Patrolman or another law enforcement officer dead." (JA. 26) (emphasis added)

- "*When you vote to tell Judge Pittman that Samuel Johnson should suffer the penalty of death, you're going to be telling Samuel Johnson and others like him who commit second degree assault with the intent to commit*

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6 Although the prosecutor referred in closing argument to the "certified copy of Samuel Johnson's conviction" (JA. 20)—and invited the jury to take the document to the jury room while it deliberated (JA. 20)—what he introduced was actually a certified copy of the record of Johnson's commitment to Elmira Reception Center, where Johnson served his sentence (JA. 8-9).

first degree rape and who have a high potential for violence and who murder Highway Patrolmen and other innocent people when they're doing their jobs and going about their own business, *you're going to be telling them that the people of our state have the courage to rid our state of people like that; that we don't want people like that in our state, especially when they have a violent record like that and the potentiality of hurting somebody else.*" (JA. 27) (emphasis added)

- "*But it [a vote for death] will also stop Samuel Johnson from hurting anybody else and it will tell others like him that we don't reward people who commit second degree assault with the intent to commit first degree rape* and who are returned to the penitentiary again and again and again and who have high potentiality for violent acts and who kill law officers who are doing their jobs." (JA. 29) (emphasis added)

- "*You are not the one executing Samuel Johnson. Regardless of what they tell you, you're not the one. He chose that himself when he decided to be a criminal in 1963.*" (JA. 30) (emphasis added)

The sentencing instructions required the jury to specify any aggravating circumstances that it found (JA. 15-17). The jury found three such circumstances: that Johnson had a prior violent felony conviction (Miss. Code Ann. § 99-19-101(5)(b)), that the murder was "especially heinous, atrocious and cruel" (Miss. Code Ann. § 99-19-101(5)(h)), and that it was committed to avoid arrest or escape from custody (Miss. Code Ann. § 99-19-101(5)(e)) (JA. 32). Following instructions which told it to weigh the aggravating circumstances against the mitigating circumstances (JA. 12-13; 15; 17-18), the jury concluded:

> "We, the Jury, find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the Defendant should suffer the penalty of death." (JA. 32)[7]

After his capital murder conviction was affirmed on direct appeal, Johnson filed a petition for post-conviction relief in the Mississippi Supreme Court. His petition alleged, among other things, that the 1963 New York conviction relied on at sentencing was unconstitutional. Under Mississippi procedure, a defendant seeking to challenge the validity of an out-of-state conviction used to enhance a sentence in Mississippi must first challenge the conviction in the state where it was entered. *Phillips* v. *State*, 421 So. 2d 476, 481-82 (Miss. 1982). If successful, the defendant may then bring the vacatur to the attention of the Mississippi courts by motion for post-conviction relief. Johnson followed the procedure in *Phillips* by bringing a proceeding in New York to challenge his 1963 conviction.

2. The Proceedings in New York

On July 30, 1986 Johnson commenced a proceeding for post-conviction relief pursuant to N.Y. Crim. Proc. Law § 440.10 (McKinney 1983) in the County Court for Monroe County, New York, seeking to vacate his 1963 assault conviction. He argued that his 1963 conviction was unconstitutional on at least three grounds and submitted affidavits supporting his claims, including one by a sitting Justice of the Supreme Court of the State of New York who had represented Johnson's co-defendant at the 1963 trial. The affidavits established that a confession obtained from Johnson was introduced at the 1963 trial, that use of the confession was contested at trial on the

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7 The jury was required to make certain written findings of fact before imposing a death sentence. Miss. Code Ann. § 99-19-101(3) (Supp. 1987). Under Mississippi law, the jury need not specify mitigating circumstances, and may decide not to impose the death penalty even if aggravating circumstances outweigh mitigating circumstances. *Tokman* v. *State*, 435 So. 2d 664, 669 (Miss. 1983), *cert. denied*, 467 U.S. 1256 (1984); *Coleman* v. *State*, 378 So. 2d 640, 646 (Miss. 1979).

ground that the confession was involuntary,[8] and that no hearing was held on the issue of voluntariness, as required by *Jackson* v. *Denno*, 378 U.S. 368 (1964), and *People* v. *Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

The affidavits also established that Johnson was not informed of his right to take a direct appeal from the 1963 conviction (JA. 127-39) in violation of his rights under *People* v. *Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969). In 1967 Johnson had filed a *pro se* notice of appeal, which a court clerk in Monroe County dismissed as "untimely," not knowing that Johnson had not previously been advised of his right to appeal (JA. 96; 125). Between 1967 and 1971 Johnson made two other *pro se* efforts to obtain relief from the denial of his right to a direct appeal and violation of his rights under *Huntley*. In 1971 the Monroe County Public Defender's Office was appointed to represent Johnson on an appeal from the denial of a *coram nobis* application attacking the 1963 conviction, but that office never perfected the appeal or filed a brief on Johnson's behalf (JA. 134-35).

On October 25, 1986 the County Court ordered that Johnson be resentenced to permit him to take a direct appeal from his 1963 conviction. Johnson then appealed to the Appellate Division, Fourth Department, which denied him relief. 125 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986).

The New York Court of Appeals granted leave to appeal, and on March 24, 1987 that court unanimously reversed the Appellate Division's order, vacated the 1963 conviction and dismissed the underlying indictment on the ground that Johnson had been denied his constitutional right to appeal and had demonstrated by affidavits the existence of "appealable issues with possible merit," including the admission of the confession challenged as coerced. *People* v. *Johnson*, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) (*per curiam*) (JA. 95-97). In its decision, the New York Court of Appeals stated:

8 The affidavits indicated that the 20-year-old Johnson gave a statement to the police after having been interrogated for 12-16 hours while awaiting arraignment (JA. 138).

> "It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining review of the conviction to which he was entitled." *Id.* (JA. 96)

Johnson promptly notified the Mississippi Supreme Court, which had previously been advised of the New York proceedings,[9] that the New York Court of Appeals had vacated his 1963 conviction and filed with it a certified copy of the New York judgment (JA. 94).

3. The Mississippi Supreme Court's Decision Denying Post-Conviction Relief

On May 27, 1987 the Mississippi Supreme Court denied Johnson's motion for post-conviction relief. The court noted that while it had "little doubt that in a rational sentencing process . . . the other two aggravating circumstances would carry greater weight than the New York conviction in determining [petitioner's] sentence," it was required to "eschew 'harmless error' in [its] . . . reasoning . . . because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty." 511 So. 2d at 1338 (JA. 104). A majority of the court held, however, that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." 511 So. 2d at 1338 (JA. 105).[10] The majority took this

9 A copy of Johnson's motion seeking to vacate his 1963 conviction was annexed as Exhibit L to his Mississippi motion for post-conviction relief (JA. 90).

10 The majority said it would not decide whether "a prior conviction can be used as an aggravating circumstance if that conviction is subsequently reversed *on direct appeal*." 511 So. 2d at 1338 (JA. 105) (emphasis added). As pointed out in the *amicus* brief of the Attorney General of the State of New York in support of Johnson's petition for

position because, "[i]f we adopted Johnson's argument, the state could never use a conviction as an aggravating circumstance, because of the *extreme likelihood* that a foreign state could overturn the prior conviction through collateral attack." 511 So. 2d at 1338 (JA. 105) (emphasis added). The majority also suggested—citing nothing in the record—that the decision of the New York Court of Appeals was not controlling on the Mississippi courts because the New York proceedings did not appear to be "truly adversarial." 511 So. 2d at 1338 (JA. 105). It went on to say that "the state's attorney in New York had no significant interest or concern in vouchsafing the validity of [the] 1963 conviction" (*id.*), and that it was Mississippi, not New York, that "had the greatest interest in upholding the validity of [the] New York conviction" (*id.*).

The majority also held that Johnson's claim was procedurally barred because:

> "At no time during his direct appeal, or in his petition for certiorari to the U.S. Supreme Court did [Johnson] argue his New York conviction was constitutionally invalid. Moreover, there is nothing to suggest he took any steps to vacate this conviction until he filed this petition." 511 So. 2d at 1337 (JA. 102).

No requirement of any such proceedings had existed in Mississippi jurisprudence before it was announced for the first time in this case. Furthermore, as the New York Court of Appeals expressly found, Johnson had made at least three *pro se* efforts to challenge the validity of his 1963 conviction (JA. 96; 126).

Three justices of the Mississippi Supreme Court dissented, arguing that where a prior conviction is "successfully" and "vigorously" argued by the prosecution as an aggravating circumstance, resentencing is required "should the prior conviction ultimately be set aside." 511 So. 2d at 1344 (JA. 114; 118). They criticized the majority for giving the decision of the New York Court of Appeals "less than full faith and credit," 511 So. 2d at 1343 (JA. 117), and argued that the invalidation of Johnson's 1963 conviction "undermines confidence in the outcome of the penalty phase of his capital murder trial." 511 So. 2d at 1345 (JA. 121). The dissenters also argued that Johnson's claim was not procedurally barred, because under Mississippi law, he could not have sought relief until he "obtained the order of March 24, 1987 vacating his 1963 New York conviction." 511 So. 2d at 1343 (JA. 115).

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certiorari (at 13), Johnson's conviction *was* reversed by the New York Court of Appeals on direct appeal. Under Mississippi law, the appropriate relief for denial of a direct appeal is also to grant an out-of-time appeal. *See, e.g., Williams v. State*, 456 So. 2d 1042 (Miss. 1984).

SUMMARY OF ARGUMENT

1. This Court has never held that, consistent with the Full Faith and Credit Clause, a state may use a prior conviction in a sister state to enhance a criminal sentence—much less to put a defendant to death—and at the same time refuse to recognize a subsequent decision by the sister state vacating the same conviction. While the Full Faith and Credit Clause does not require a state to use an out-of-state conviction for enhancement, it does require that a state which does so must recognize a subsequent decision by the sister state to vacate that conviction on constitutional grounds. Mississippi's refusal to recognize the 1987 vacatur on grounds insulting to the New York Court of Appeals is a plain affront to the Full Faith and Credit Clause.

2. The judgment below should be reversed because the Mississippi Supreme Court did not follow this Court's decisions in *Burgett* v. *Texas*, 389 U.S. 109 (1967), *Townsend* v. *Burke*, 334 U.S. 736 (1948), and *United States* v. *Tucker*, 404 U.S. 443 (1972). *Burgett* holds that a constitutionally infirm conviction is inadmissible to enhance punishment for another offense. *Tucker* and *Townsend* hold that where a sentencer relied on an invalid prior conviction or other "misinformation" of constitutional magnitude, the sentence must be set aside. Nothing in *Zant* v. *Stephens*, 462 U.S. 862 (1983), requires a contrary result in a death case. *Zant* expressly distinguished the situation

presented here, in which constitutionally impermissible evidence is made the basis for a death sentence through the vehicle of an aggravating circumstance supported solely by such inadmissible and highly prejudicial evidence. In Johnson's case, the statutory aggravating circumstance of a prior violent felony was supported only by evidence of an unconstitutional and now vacated conviction. The jury was directed to weigh that conviction in the balance when it decided whether to impose the death penalty. The introduction of such evidence at a capital sentencing proceeding cannot be harmless error, and the Mississippi Supreme Court expressly declined to rest its decision on harmless error grounds. 511 So. 2d at 1338 (JA. 104).

3. Johnson's claim is not procedurally barred. The procedural requirement invoked by the majority below had not been previously announced, is inconsistent with the plain terms of *Phillips* v. *State*, 421 So. 2d 476, 481-82 (Miss. 1982), and has not been followed by the Mississippi Supreme Court in any case but Johnson's. A state procedural rule that is applied without notice and is not regularly followed cannot bar review of federal constitutional claims. Under Mississippi law, a defendant seeking to challenge the validity of an out-of-state conviction used to enhance a Mississippi sentence must first succeed in setting aside the challenged conviction in the jurisdiction where it was entered *before* requesting relief in Mississippi. That is exactly what Johnson did here.

ARGUMENT

I.

THE REFUSAL OF THE MISSISSIPPI SUPREME COURT TO RECOGNIZE THE JUDGMENT OF THE NEW YORK COURT OF APPEALS VACATING PETITIONER'S 1963 NEW YORK CONVICTION VIOLATES THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION

The Full Faith and Credit Clause of the Constitution, U.S. Const. Art. IV, § 1, obligated the Mississippi Supreme Court to recognize and respect the decision of the New York Court of Appeals vacating Johnson's 1963 conviction, but the Mississippi court explicitly refused to do so. It held that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." 511 So. 2d at 1338 (JA. 105). The plain implication of that holding is that the Mississippi Supreme Court treated the New York Court of Appeals' decision differently from how it would have treated its own decision invalidating a Mississippi conviction on constitutional grounds and differently from how it would have been treated by New York. This alone violates the Full Faith and Credit Clause and requires reversal.

"The concept of full faith and credit is central to our system of jurisprudence." *Underwriters National Assurance Co.* v. *North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691, 703 (1984). The principle that a state must recognize and respect its sister states' decisions gained recognition as early as 1644 when the Confederation of New England Colonies recommended that the verdict or sentence of any court within the colonies be accorded the same force and esteem by the other colonies' courts as it would have received in the courts of the rendering colony. Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 Mich. L. Rev. 33, 38 (1957). The Founders included a full faith and credit provision in the

Articles of Confederation, *id.* at 34-35, and broadened its scope in the Federal Constitution.[11]

Justice Jackson articulated the importance of full faith and credit to the newly-developed system of federalism:

> "By the full faith and credit clause, [the Founders] sought to federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition of public acts, records, and judicial proceedings. It was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states." Jackson, *Full Faith and Credit, The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 17 (1945) (citations omitted).

See also Morris v. *Jones*, 329 U.S. 545, 553 (1947).

This Court has uniformly required that a forum state lend "the same credit, validity, and effect" to a judgment as would "the state where it was pronounced." *Underwriters National Assurance Co.* v. *North Carolina Guaranty Ass'n*, *supra*, 455 U.S. at 704 (quoting *Hampton* v. *McConnell*, 16 U.S. (3 Wheat.) 234, 235 (1818) (Marshall, C.J.)). "[J]udgments within the jurisdiction of the rendering state [are entitled to] the same faith and credit in sister states as they have in the state of the original forum." *Johnson* v. *Muelberger*, 340 U.S. 581, 584 (1951) (footnote omitted).

The repeated errors made by the Mississippi Supreme Court in construing New York law and reviewing New York proceedings demonstrate the importance of the policies underlying the Full Faith and Credit Clause. As the *amicus curiae* brief of the

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11 *See* Costigan, *The History of the Adoption of Section I of Article IV of the United States Constitution*, 4 Colum. L. Rev. 470, 471-74 (1904); Corwin, *The "Full Faith and Credit" Clause*, 81 U. Pa. L. Rev. 371, 373 (1933).

State of New York in support of the petition for certiorari points out, the Mississippi court erroneously believed that Johnson's 1963 conviction was "final" in New York, 511 So. 2d at 1339 (JA. 105), when in fact it was not final because his appeal had never been perfected pursuant to N.Y. Crim. Proc. Law § 460.10 (McKinney 1983) (N.Y. Att'y Gen. *Amicus* Br. 13-14). The Mississippi court erroneously believed that the conviction had been overturned on collateral review, 511 So. 2d at 1337-38 (JA. 105), when in fact it was reversed on direct appeal (N.Y. Att'y Gen. *Amicus* Br. 10-13). The Mississippi court erroneously believed that Johnson never sought to vacate the 1963 conviction until he filed his post-conviction relief petition in Mississippi, 511 So. 2d at 1337 (JA. 102), when in fact he had sought unsuccessfully on three separate occasions between 1967 and 1971 to raise the issues of the denial of his right to appeal and the *Huntley* violation which eventually prevailed in the New York Court of Appeals (N.Y. Att'y Gen. *Amicus* Br. 4).

Under New York law, reversal of the 1963 conviction rendered that conviction a nullity and all prior proceedings void *ab initio*. *People ex rel. Sloan* v. *Lawes*, 255 N.Y. 112, 117, 174 N.E. 80, 81 (1930); *Burrell* v. *McMann*, 51 Misc. 2d 185, 188, 273 N.Y.S.2d 9, 12 (Sup. Ct. Clinton Co. 1966). Mississippi was obliged by the Full Faith and Credit Clause to treat the New York reversal as New York would have treated that reversal.

The majority of the Mississippi Supreme Court attributed to the New York Court of Appeals a motive to "vitiate the death penalty verdict" in Mississippi. 511 So. 2d at 1338 (JA. 21). In its view, the New York proceeding "lacked an essential adversarial ingredient," 511 So. 2d at 1338-39 (JA. 106); the State of New York had no "significant interest" in upholding Johnson's New York conviction. 511 So. 2d at 1338 (JA. 105).

These accusations impugning the integrity of the New York judicial system are an affront to the Full Faith and Credit Clause. The Constitution demands "not some, but full credit" to sister-state determinations. *Davis* v. *Davis*, 305 U.S. 32, 40 (1938). *See also Johnson* v *Muelberger*, *supra*, 340 U.S. at 584. The Full Faith and Credit Clause

> "is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns . . . . It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical question of the federal system, which the Constitution designed, demanded it." *Estin* v. *Estin*, 334 U.S. 541, 545-46 (1948) (citation omitted).

Accord Milwaukee County v. *M.E. White Co.*, 296 U.S. 268, 276-77 (1935).

It is not for Mississippi to inquire into the supposed motivations of the New York Court of Appeals and to deny recognition to the decisions of that court if it finds that they are wrongly motivated. The dictate of the Full Faith and Credit Clause is that sister-state judgments are presumptively valid and all inquiry into their merits is precluded. *Stute* v. *Duke*, 205 Kan. 37, 40-41, 468 P.2d 132, 135 (1970) (criminal foreign convictions have "a presumption in favor of . . . validity"); *Ex parte Wolfson*, 30 Cal. 2d 20, 31, 180 P.2d 326, 333 (1947) (even if out-of-state criminal "judgment were erroneous . . . it has been duly certified to us as the solemn judgment of a sister state, the jurisdiction of the court which rendered it is not questioned, and it is therefore entitled to full faith and credit"); *State* v. *Prince*, 64 Idaho 343, 348, 132 P.2d 146, 148 (1942) (Oregon's "judgment imports absolute verity and is final and conclusive"). A court "should assume that steps taken by a sister state to protect rights are accurate and in good faith." *Commonwealth ex rel. Marshall* v. *Gedney*, 478 Pa. 299, 311, 386 A.2d 942, 948 (1978) (Roberts, J., concurring). As this Court held in *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940):

> "[I]f the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself.' In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic

> or consistency of the decision, or validity of the legal principles on which the judgment is based. . . . Whatever mistakes of law may underlie the judgment, it is 'conclusive as to all the *media concludendi*.' " (citations omitted)[12]

In *United States ex rel. Savini* v. *Jackson*, 250 F.2d 349 (2d Cir. 1957), the defendant's enhanced sentence under the New York Multiple Offender Law was based upon an earlier Michigan conviction which was later held to be unconstitutional. The Second Circuit held that the defendant was entitled to be resentenced:

> "To the extent that any State makes its penal sanctions depend in part on the fact of prior convictions elsewhere, necessarily it must assume the burden of meeting attacks on the constitutionality of such prior convictions. Constitutional guarantees should not be shorn of their vitality merely to facilitate the administration of a penal policy whereby the sentence on one conviction depends in part on a prior conviction." 250 F.2d at 355.

Other courts have recognized that the constitutional command of full faith and credit extends to subsequent reversals of criminal judgments. In *People* v. *Willis*, 79 A.D.2d 1036, 1037,

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12 While it is a truism that the Full Faith and Credit Clause does not require a state to enforce a foreign penal judgment, this exception has no application here. Johnson did not ask Mississippi to enforce New York's penal law. Johnson asked Mississippi only to recognize that his 1963 New York conviction had been reversed and no longer provided any basis for use as the aggravating circumstance. In this context the Full Faith and Credit Clause applies; a state must *recognize* a foreign state's criminal judgments. *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 291-92 (1888). *See also Farmland Dairies* v. *Barber*, 65 N.Y.2d 51, 55-56, 478 N.E.2d 1314, 1316-17, 489 N.Y.S.2d 713, 715-16 (1985); *State* v. *Johnston*, 17 Wash. App. 486, 497, 564 P.2d 1159, 1166 (1977); *Hill* v. *Blake*, 186 Conn. 404, 410-11, 441 A.2d 841, 845 (1982); *Bennett* v. *State*, 476 S.W.2d 281, 283 (Tex. Crim. App. 1972); *Ex parte Wolfson*, *supra*, 30 Cal. 2d at 31, 180 P.2d at 333.

435 N.Y.S.2d 38, 39 (2d Dep't 1981), the court held that New York must recognize the dismissal of a Texas indictment entered after New York had sentenced the defendant as a second felony offender and granted defendant's motion to vacate the New York sentence. In *Kellogg* v. *State*, 504 P.2d 440, 442 (Okla. Ct. Crim. App. 1972), the court stated that under the Full Faith and Credit Clause "Oklahoma could not choose to recognize one act of the sister-state, the conviction, and then ignore its subsequent act which nullified the conviction." *See also People* v. *Terry*, 61 Cal. 2d 137, 148, 390 P.2d 381, 388, 37 Cal. Rptr. 605, 612, *cert. denied*, 379 U.S. 866 (1964) (reversing California death sentence where sentencing court relied on Oklahoma conviction that was later pardoned: California "must give an administrative decision of Oklahoma, represented here by the pardon, the same effect in California as that decision would have borne in Oklahoma") (footnote omitted). There is simply no room for a more niggardly view of the respect which Mississippi owes to the judicial judgments of New York under the Full Faith and Credit Clause.

II.

THE DEATH PENALTY MAY NOT BE CONSTITUTIONALLY IMPOSED WHERE THE PRINCIPAL EVIDENCE RELIED ON AT SENTENCING IS A PRIOR CONVICTION LATER HELD TO BE UNCONSTITUTIONAL

The jury that sentenced Samuel Johnson to death would have seen him very differently had it not been told repeatedly that he was convicted in 1963 of "second degree assault with intent to commit first-degree rape"—an invalid conviction for a peculiarly inflammatory crime.[13] The Mississippi prosecutor offered

13 Rape is "inherently one of the most egregiously brutal acts one human being can inflict upon another . . . ." *Coker* v. *Georgia*, 433 U.S. 584, 607-08 (1977) (Burger, C.J. and Rehnquist, J., dissenting). The crime has historically been treated with special severity when committed by a black man, *see Furman* v. *Georgia*, 408 U.S. 238, 364 (1972) (Marshall, J., concurring) (405 of 455 men executed for rape between 1930 and 1968 were black), particularly in the Southern states, *see* L. Baughman, *Southern Rape Complex* (1966); C. Hernton, *Sex and Racism in America* (1965).

no evidence of any other violent felony conviction. The prosecutor's many references to the invalid 1963 conviction put before the jury a critical, erroneous consideration that could not have failed to weigh heavily in its ultimate decision that Johnson should die.[14] The invalid conviction was used to prove an aggravating circumstance that the jury expressly relied upon in its sentencing determination, and, as the Mississippi Supreme Court itself acknowledged, there is no way to know whether the jury would have returned a death sentence without it.

A. The Eighth and Fourteenth Amendments Require Death Sentences To Be Based on Reliable Information

The function of aggravating circumstances in a capital sentencing scheme is to "satisfy the concerns of *Furman*" by providing a " 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " *Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion) (quoting *Furman* v. *Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)); *see also Godfrey* v. *Georgia*, 446 U.S. 420, 427-28 (1980). Because the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978), the facts used to es-

14 The leading study of jury behavior concludes that a jury is substantially more likely to convict a defendant if it knows that he has a prior conviction. H. Kalven & H. Zeisel. *The American Jury* 127-30, 177-80 (1966). *See also* Cornish & Sealy, *Juries and the Rules of Evidence* [London School of Economics Jury Project], [1973] Crim. L. Rev. 208, 210. *Cf. Boyd* v. *United States*, 142 U.S. 450, 458 (1892) (Harlan, J.) (proof of prior crimes "only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with the crime involving the punishment of death").

tablish aggravating circumstances must themselves be determined in a reliable manner. That is why the Court has "invalidated prodedural rules that tended to diminish the reliability of the sentencing determination," *Beck* v. *Alabama*, 447 U.S. 625, 638 (1980) (footnote omitted); *see also Caldwell* v. *Mississippi*, 472 U.S. 320, 328-30 (1985), and has reversed death sentences where facts offered in aggravation were not subject to adequate adversary testing. *See, e.g., Gardner* v. *Florida*, 430 U.S. 349 (1977); *Ake* v. *Oklahoma*, 470 U.S. 68, 83-84 (1985). Procedures for determining aggravating circumstances must respect the basic premises of the Anglo-American system of adversary criminal justice such as those embodied in the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. *Estelle* v. *Smith*, 451 U.S. 454 (1981).

Apart from the commission and circumstances of the murder, the sole fact about Samuel Johnson's life that Mississippi law defined as an aggravating circumstance was that he had previously perpetrated another violent crime. The prosecutor hammered on this fact repeatedly in calling for the death sentence, and the jury found it and explicitly weighed it in the balance when sentencing Johnson to die. However, the only basis for concluding that Johnson had committed another violent crime—his 1963 conviction in the courts of New York—was voided by those courts because of unresolvable doubts as to whether the conviction was obtained through the procedure declared unconstitutional in *Jackson* v. *Denno*, 378 U.S. 368 (1964), and because Johnson was denied his right to counsel on appeal, vouchsafed by *Douglas* v. *California*, 372 U.S. 353 (1963). *Jackson* explicitly held that the procedure in effect in New York State when Johnson was tried in Monroe County in 1963 "poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined."

378 U.S. at 389.[15] And *Douglas* stands to assure against the risk that an unreviewed criminal judgment is " 'infect[ed] . . . with the clear danger of convicting the innocent.' " *Stovall* v. *Denno*, 388 U.S. 293, 298 (1967) (quoting *Tehan* v. *Shott*, 382 U.S. 406, 416 (1966)).[16]

Resentencing is required just as it was in *United States* v. *Tucker*, *supra*, by the principles of *Townsend* v. *Burke*, *supra*, and *Burgett* v. *Texas*, *supra*. These principles require that, "even in a noncapital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part on 'misinformation of constitutional magnitude' such as prior uncounseled convictions that were unconstitutionally imposed." *Zant* v. *Stephens*, *supra*, 462 U.S. at 887 n.23.

B. Reliance on a Subsequently Invalidated Prior Conviction at Sentencing in a Capital Case Requires Resentencing

In *Burgett* v. *Texas*, *supra*, the Court held that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* [, 372

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15 Of course, "*any* criminal trial use against a defendant of his *involuntary* statement is a violation of due process of law." *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) (emphasis in original).

In *Martinez* v. *Estelle*, 612 F.2d 173 (5th Cir. 1980), the court considered the use of a prior robbery conviction to enhance a sentence. The defendant alleged that the conviction had been secured by use of a coerced confession. The Fifth Circuit held:

> "If the confession was not voluntarily given the robbery conviction is void. A void conviction may not be used to enhance an individual's sentence . . . ."

Id. at 175 (citing *Burgett* v. *Texas*, *supra*, 389 U.S. at 112-13).

16 The denial of Johnson's right to counsel on appeal violated both the federal Constitution, *Evitts* v. *Lucey*, 469 U.S. 387 (1985), and New York law. *People* v. *Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969). The admission of his 1963 conviction tainted by the violation of these rights was "inherently prejudicial," as in *Burgett* v. *Texas*, *supra*, 389 U.S. at 115, because the denial of the right to appellate counsel implicates the same constitutional concerns

U.S. 335 (1963)] to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. . . . [T]he accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115. *Burgett* was followed in *United States* v. *Tucker*, *supra*, where the trial judge specifically considered the defendant's three previous convictions before sentencing him for armed robbery in 1953. Two of those three convictions—a 1938 Florida conviction and a 1946 Louisiana conviction—were later held to be unconstitutional under *Gideon* v. *Wainwright*, *supra*, by a California state court. This Court held that it was error for the sentencing judge to have considered the defendant's invalid convictions and remanded for resentencing without reference to the unconstitutional convictions.

The basis for the *Tucker* holding was that the defendant's sentence was "founded at least in part upon misinformation of constitutional magnitude," 404 U.S. at 447, and that but for his unconstitutional prior convictions, "the factual circumstances of [Tucker's] background would have appeared in a dramatically different light at the sentencing proceeding." 404 U.S. at 448. Rejecting the argument that Tucker had not shown that he was not guilty of the earlier crimes, the Court said:

> "We need not speculate about whether the outcome of the respondent's 1938 and 1946 prosecutions would necessarily have been different if he had had the help of a lawyer. Such speculation is not only fruitless, but quite beside the point. For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained." 404 U.S. at 447-48 (footnotes omitted).

as *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Indeed, "the promise of *Douglas* that a criminal defendant has a right to counsel on appeal [is] . . . like the promise of *Gideon* that a criminal defendant has a right to counsel at trial." *Evitts* v. *Lucey*, *supra*, 469 U.S. at 397.

In *Loper* v. *Beto*, 405 U.S. 473, 482 (1972), the Court noted that the "*Tucker* case involved . . . that aspect of *Burgett* that prohibits the use of invalid prior convictions to 'enhance punishment.' " While *Burgett* dealt with a denial of the right to counsel, the Court there indicated that the result would be the same in the case of convictions obtained in violation of other fundamental constitutional rights, such as coerced confessions and denial of the right of confrontation. 389 U.S. at 114.

In *Townsend* v. *Burke*, *supra*, the Court held that a conviction and sentence would be vacated where the defendant "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." There, the sentencing court considered the defendant's numerous prior convictions, but it attributed to him three convictions for crimes of which he had been acquitted. The Court held that "[s]uch a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." 334 U.S. at 741.[17]

17 At least seven courts of appeals have invalidated sentences where there was a subsequent reversal of a prior conviction relied on at sentencing. *United States* v. *Walters*, 526 F.2d 359 (3d Cir. 1975); *Bourgeois* v. *Whitley*, 784 F.2d 718 (5th Cir. 1986); *Walker* v. *United States*, 636 F.2d 1138 (6th Cir. 1981); *United States* v. *Hubbard*, 618 F.2d 422 (7th Cir. 1980) (*per curiam*); *Taylor* v. *United States*, 472 F.2d 1178 (8th Cir. 1973) (*per curiam*); *Leano* v. *United States*, 494 F.2d 361 (9th Cir. 1974); *Martinez* v. *United States*, 464 F.2d 1289 (10th Cir. 1972). The remaining five courts of appeals have all applied the *Tucker-Townsend* rule to condemn sentences based on other material misinformation or false assumptions regarding a defendant's prior record. *United States* v. *Picard*, 464 F.2d 215 (1st Cir. 1972); *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970); *Baker* v. *United States*, 388 F.2d 931 (4th Cir. 1968); *United States* v. *Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); *United States* v. *Lemon*, 723 F.2d 922 (D.C. Cir. 1983).

That Johnson's 1963 conviction was invalidated by the New York courts after his Mississippi trial, not before, makes no difference. *See United States* v. *Tucker*, *supra*, 404 U.S. at 444-45. Mississippi does not permit its courts to entertain contentions of the invalidity of out-of-state prior convictions offered as the basis for enhanced sentencing, but instead remits the defendant to post-conviction remedies first "in the state in which such conviction occurred" and then—if and after the out-of-state conviction is invalidated—by post-conviction challenge to the Mississippi sentence through a "petition for writ of error *coram nobis*." *Phillips* v. *State*, *supra*, 421 So. 2d at 482. If Mississippi permitted defendants to challenge out-of-state prior convictions in its courts at the time they are used for sentencing purposes, it could possibly bind them to the outcome of whatever determination resulted from those challenges. But Mississippi cannot decline to entertain such challenges at its own trials, send defendants back to the courts of the conviction state to make them, and then refuse to recognize the decisions of those courts as coming too late.

C. Unconstitutional Evidence Weighed by a Jury Cannot Support a Death Sentence

Zant v. *Stephens*, *supra*, in no way conflicts with the principles of *Burgett*, *Tucker* and *Townsend*, but rather embraces them. Writing for the Court, Justice Stevens stated:

> "As we held in *United States* v. *Tucker*, 404 U.S. 443, 447-449 (1972), even in a noncapital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part on 'misinformation of constitutional magnitude' such as prior uncounseled convictions that were unconstitutionally imposed. See *Townsend* v. *Burke*, 334 U.S. 736, 740-741 (1948) (reversing a sentence imposed on uncounseled defendant because it was based on 'extensively and materially false' assumptions concerning the defendant's prior criminal record)." 462 U.S. at 887 n.23.

The current Chief Justice, concurring, agreed that "a more careful application of [the *Tucker-Townsend* rule] is appropriate in capital cases." *Id.* at 903.

In *Zant*, the defendant was convicted of capital murder and sentenced to death by a Georgia jury. At the sentencing phase the jury found three aggravating circumstances, one of which was held in a later case to be too vague for constitutional enforcement.[18] Nevertheless, all of the evidence relied upon at sentencing to prove this aggravating circumstance was "fully admissible," 462 U.S. at 886, and the jury had not been instructed to weigh aggravating circumstances against mitigating circumstances.

This Court held that where an invalid aggravating circumstance is found by a capital sentencing jury, but where the circumstance is neither weighed by the jury in the ultimate life-or-death decision nor supported by constitutionally inadmissible evidence, reversal of a death sentence is not thereby required. In so ruling, however, the Court was at pains to point out that the submission of an invalid aggravating circumstance to the jury in that case did not result in the introduction of any evidence that would otherwise have been excluded from the jury's consideration in sentencing. 462 U.S. at 886-88. *See also Barclay* v. *Florida*, 463 U.S. 939, 956 (1983). Specifically, there was no contention in *Zant* (or in *Barclay*) that "the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information." 462 U.S. at 887 n.24.[19] In

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18 The Georgia Supreme Court held the aggravating circumstance of "a substantial history of serious assaultive criminal convictions" to be unconstitutionally vague. *Arnold* v. *State*, 236 Ga. 534, 539-42, 224 S.E.2d 386, 391-92 (1976).

19 In *Smith* v. *Murray*, 106 S. Ct. 2661 (1986) (to be officially reported at 477 U.S. 527), the majority found it unnecessary to reach the issue reserved by *Zant*. The four members of the Court who did reach the issue said:

> "We did not conclude [in *Zant*] . . . that any evidence concerning the invalid circumstance was simply irrelevant because the valid cir-

addition, the invalid aggravating circumstance in *Zant* was rendered harmless because "[u]nder Georgia's sentencing scheme, and under the trial judge's instructions in [the *Zant*] case, no suggestion is made that the presence of more than one aggravating circumstance should be given special weight." 462 U.S. at 891.[20]

This case presents the opposite situation distinguished in *Zant*: one in which the challenged aggravating circumstance *was* the vehicle for introducing inadmissible and strongly prejudicial evidence, and where the "jury [was] . . . specifically instructed to weigh . . . aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." *Id.* at 890.[21]

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cumstances were, in all events, sufficient to support the death penalty. The fact that the record adequately establishes one valid aggravating circumstance may make the defendant eligible for the death penalty but it does not justify the conclusion that a death sentence should stand even though highly prejudicial inadmissible evidence was presented to the jury at the sentencing hearing. The introduction of such highly prejudicial, inadmissible evidence—evidence that itself represents an independent constitutional violation—quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment." *Id.* at 2677 (Stevens, J., dissenting).

20 The *Zant* opinion stated that it did "not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." 462 U.S. at 890.

21 In *Barclay* v. *Florida*, *supra*, where the sentencer also weighed aggravating against mitigating evidence, the Florida Supreme Court was permitted to find that on the facts of the case the sentencer's consideration of an invalid aggravating circumstance was harmless error. 463 U.S. at 958. *See also Wainwright* v. *Goode*, 464 U.S. 78 (1983) (*per curiam*). The Mississippi Supreme Court in the present case explicitly "eschew[ed] 'harmless error' in [its] . . . reasoning . . . because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty." 511 So. 2d at 1338 (JA. 104).

III.

PETITIONER'S CLAIMS ARE NOT PROCEDURALLY BARRED

A majority of the Mississippi Supreme Court held that, because Johnson did not challenge the validity of his 1963 conviction on direct appeal, he was "procedurally barred" under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-21 (Supp. 1987), and could not seek relief from his death sentence after the New York Court of Appeals reversed that conviction in 1987. 511 So. 2d at 1337 (JA. 102).

At the time of Johnson's trial and direct appeal, however, Mississippi law specifically required that, in order to attack an out-of-state conviction used to enhance a Mississippi sentence, a defendant had to bring a proceeding "in the state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief [was to] . . . be sought in Mississippi by petition for writ of error *coram nobis*." *Phillips* v. *State*, *supra*, 421 So. 2d at 482. The *Phillips* rule has been held to apply to death cases. *Nixon* v. *State*, ____ So. 2d ____, DP-65, Slip Op. at 33 (Miss. Nov. 25, 1987).

Because of the *Phillips* rule, the court that tried Johnson for capital murder could *not* have considered the validity of his 1963 conviction when Johnson was sentenced in 1982.[22] The

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22 In *Bandy* v. *State*, 495 So. 2d 486 (Miss. 1986), the defendant was indicted and tried for child molesting and sentenced as a habitual offender to life imprisonment. At trial the prosecution introduced two prior convictions—one in Texas and the other in Iowa—to show that the defendant had previously been convicted of crimes of violence; without proof of at least one prior violent conviction the defendant could not have been sentenced as a habitual offender. The defendant sought to challenge the constitutionality of the two prior convictions on direct appeal. Relying on *Phillips*, the Mississippi Supreme Court held that the constitutionality of a prior conviction used to enhance a Mississippi sentence *cannot* be raised on direct appeal, but can be challenged only in a separate proceeding for post-conviction relief. That

Mississippi Supreme Court would *not* have considered the validity of the 1963 conviction on Johnson's direct appeal in 1984 because *Phillips* expressly requires that relief from enhanced sentences must be sought by petition for a writ of error *coram nobis*, not on direct appeal. 421 So. 2d at 482.[23] As Justice Robertson pointed out in dissent below, any challenge by Johnson to the constitutionality of his New York 1963 conviction on direct appeal would have been "dismissed . . . out of hand" under the Mississippi precedents. 511 So. 2d at 1343 (JA. 115).

State procedural-bar rules cannot be invoked to preclude consideration of federal constitutional rights unless those rules "were clearly announced to defendant and counsel" and regularly followed at the time of his trial or appeal. *Henry* v. *Mississippi*, 379 U.S. 443, 448 n.3 (1965).[24] A procedural bar is valid

court has also held that Mississippi's "habitual offender sentencing procedure resembles in all relevant respects the sentencing phase of capital crimes." *DeBussi* v. *State*, 453 So. 2d 1030, 1032 (Miss. 1984).

23 The Mississippi Supreme Court could not have decided the validity of Johnson's 1963 conviction on direct appeal without a record, but *Phillips* holds that the trial court is not to hear witnesses—or to receive trial transcripts—relating to an out-of-state conviction. Where an issue is raised that cannot be decided except by reference to facts outside the trial record, the proper remedy under Mississippi law is post-conviction relief. *In re Petition of Broom*, 251 Miss. 25, 32-33, 168 So. 2d 44, 48 (1964) (*coram nobis*). *See also Tobias* v. *State*, 505 So. 2d 1014, 1015 (Miss. 1987); *Odom* v. *State*, 483 So. 2d 343, 344 (Miss. 1986).

24 *See also James* v. *Kentucky*, 466 U.S. 341, 348-49 (1984) (only state procedural rules which are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights"); *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 301 (1964) (" '[n]ovelty in procedural requirements cannot be permitted to thwart review by this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights' ") (quoting *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958)); *Granviel* v. *Estelle*, 655 F.2d 673, 679 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003, 1007 (1982) ("[w]e cannot enforce against Granviel a contemporaneous objection rule that

only if regularly applied to all litigants. *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims").

The bar that a majority of the Mississippi Supreme Court invoked against Johnson fails conspicuously to meet these basic requirements. It was first announced in the course of denying Johnson the relief which it purportedly forecloses, and it has never been applied to other litigants, let alone regularly followed. In *Wheat* v. *Thigpen*, 793 F.2d 621, 625 n.3 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1566 (1987), the Fifth Circuit exhaustively reviewed Mississippi's invocation of procedural bars in death cases and found that the Mississippi court has "repeatedly ignored its rule prohibiting the raising of claims for the first time on writ of error *coram nobis*, if in fact the rule existed."

In fact, in 1984 when Johnson took his direct appeal, Mississippi regularly addressed issues raised for the first time on post-conviction relief. In *Smith* v. *State*, 477 So. 2d 191 (Miss. 1985), the defendant was convicted of burglary and sentenced to life imprisonment as a habitual offender. Although he had not raised any claim with respect to the validity of his enhanced sentence on direct appeal, he later sought post-conviction relief, claiming he did not know he could receive a life sentence under the statute charged in the indictment. The Mississippi Supreme Court held that his claim was not procedurally barred, even though not raised on direct appeal:

> "[T]his Court has previously held that errors affecting *fundamental rights* are exceptions to the rule that ques-

apparently did not even exist at the time of his trial"); *Wheat* v. *Thigpen*, 793 F.2d 621, 625 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1566 (1987) ("[i]f the state does not clearly announce the procedural rule or the state courts do not strictly or regularly follow the procedural rule, then the federal courts may reach the issue the state court refused to address").

tions not raised in the trial court cannot be raised for the first time on appeal. *Read* v. *State*, 430 So. 2d 832 (Miss. 1983); *Brooks* v. *State*, 209 Miss. 150, 46 So. 2d 94 (1950). It is noted that in the case sub judice that the defense counsel failed to raise the sentence issue on appeal, but that this defendant is raising the issue in his pro se post-conviction motion to correct sentence. . . . *The comparison of a seven year sentence, as opposed to a life sentence, without probation or parole is too significant a deprivation of liberty to be subjected to a procedural bar.*" 477 So. 2d at 195 (emphasis added).

Compare Woodson v. *North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two"). Even if the procedures set forth in *Phillips* had not specifically directed Johnson to proceed exactly as he did, the rule in *Smith* would preclude the application of a procedural bar to his claim. *Henry* v. *Mississippi*, *supra*, 379 U.S. at 449 n.5; *Williams* v. *Georgia*, 349 U.S. 375, 383-84 (1955).

CONCLUSION

The judgment of the Supreme Court of Mississippi should be reversed, and petitioner's death sentence should be vacated.

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Respectfully submitted,

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STATUTORY APPENDIX

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U.S. Const. Art. IV, § 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738 (1982):

State and Territorial statutes and judicial proceedings; full faith and credit.

* * *

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court and that the said attestation is in proper form.

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Miss. Code Ann. § 97-3-19 (Supp. 1987):

Homicide; murder defined; capital murder.

* * *

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriffs of counties and their deputies, constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or in any attempt to commit such felony;

(g) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

Miss. Code Ann. § 99-19-101 (Supp. 1987):

Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. . . . In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

* * *

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

* * *